SUPREME COURT, U.S. FILED
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In The

Supreme Court of the United States

October Term, 1973

No. 73-704

STEPHEN ALLEN TARIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Stephen Allen Tarin, petitions that a writ of certiorari issue to review a final decision of the United States Court of Appeals for the Second Circuit affirming the judgment of conviction entered on June 11, 1973, in the United States District Court for the Southern District of New York (Hon. Edmund L. Palmieri).

OPINION BELOW

The United States Court of Appeals for the Second Circuit affirmed the lower court without opinion.

The opinion of the United States District Court for the Southern District of New York (Judge Palmieri) appears in Appendix 9a, *infra.*

JURISDICTION

Jurisdiction is conferred on the Court by 28 U.S.C. Section 1254.

QUESTION PRESENTED

Whether petitioner's letter of June 8, 1968, informing the Board of criminal charges pending against him, presented a prima facie claim for a statutorily mandated lower classification and whether petitioner was denied due process by the Board's failure to see and consider the said letter.

STATEMENT OF THE CASE

Petitioner registered with Selective Service Local Board No. 7, Manhattan, in 1964. He was twice classified II-S as a college student. Upon being classified I-A, he requested and received a personal appearance. On May 15, 1968, the Board sent petitioner a notice that he had been classified I-A.

Within the statutory time, petitioner sent a notice of appeal, on June 8, 1968 (GE 2E, 1a). In that same letter he informed the Board that he was "now being prosecuted for criminal trespass in New York County." This letter was put into his file by a clerk of the Board and not shown to the Board members. Without petitioner's request, the matter went to a Government Appeal Agent. The agent first considered a II-S classification and then III-A and IV-F classifications and then returned the file without consulting petitioner, nor was petitioner provided with copies of his reports. The file of petitioner does not disclose what papers went to the Appeal Board, nor was petitioner so advised.

The Appeal Board had no statement from the Local Board indicating the basis upon which it made its decision to classify petitioner I-A. The Appeal Board affirmed the I-A classification on March 12, 1969, also without any given reasons. Petitioner was notified of his re-classification.

Petitioner was ordered to report for induction on April 10, 1969, despite the pending criminal action which had

been known to the Board since June 8, 1968. Petitioner did not appear for induction. On April 11, 1969, the Board received a letter from petitioner (GE 2J, 2a) repeating the fact that he was awaiting trial in the criminal trespass case.

Then for the first time, 10 months after the Board had received the information as to petitioner's pending criminal case, the Board finally considered this same pending criminal charge and decided not to reopen and reconsider petitioner's classification.

Petitioner was indicted on April 27, 1972. He was tried on April 17 and 20, 1973, before Judge Palmieri without a jury and found guilty of failing to report for induction. His appeal was argued on October 19, 1973, and the decision of the lower court was affirmed. A stay of mandate was granted for one week to file a petition for a writ of certiorari with this Court.

REASON FOR GRANTING THE WRIT

Petitioner's letter of June 8, 1968, informing the Board of criminal charges pending against him, presented a prima facie claim for a statutorily mandated lower classification and petitioner was denied due process by the Board's failure to see and consider this letter.

Petitioner's letters of June 8, 1968 (1a), informing his Selective Service Local Board of his pending criminal charge, and his letter of April 7, 1969, again informing the Board of this fact, were not given consideration by the Board until April 17, 1969 (8a). This was approximately 10 months after the first notification and 7 days after petitioner failed to report for induction.

The regulations require that a local board must reopen and "consider anew the classification of a registrant

. . . [if presented with] facts not considered when the registrant was classified which, if true, would justify a change in registrant's classification . . . ." 32 C.F.R. Section 1625.2. *United States v. Mulloy*, 398 U.S. 410 (1970), held that "non-frivolous allegations of fact" satisfy that regulation "unless the truth of these new allegations is conclusively refuted by other reliable information in the registrant's file."

That the Board must reconsider a classification on presentation of new facts under 32 C.F.R. Section 1625.2 was most recently reaffirmed in *United States v. Cohen*, ___F.2d___, No. 73-1675 (2nd Cir. September 25, 1973). In a per curiam opinion the Court stated:

> Under 32 C.F.R. 1625.2 the Board was in effect required to reopen Cohen's classification if he presented facts "not considered" when he was classified, "which, if true would justify a change" in the classification.

The petitioner's letter of June 8, 1968, informing the Board that he had been arrested and his trial in the New York City Criminal Court was pending, presented previously unconsidered, non-frivolous, uncontradicted data which mandated a lower classification. *United States v. Brunner*, 457 F.2d 1301, 5 SSLR 3300 (9th Cir. 1972), recognized that a notification by letter of an arrest would present just such a prima facie claim, except that in that case the arrest occurred while an induction order was outstanding and was only for a traffic violation, which is not a bar to induction. AR 601-270, Chap. B, Section II, Par. 3-9c(2) (SSLR, p. 2241).

Section 1622.17 of the Selective Service Regulations, 32 C.F.R. Section 1622.17, requires the Local Board to place in Class I-Y:

> Class I-Y: Registrant Not Eligible for a Lower Class Who Would Be Qualified for Military Service in Time of War or National Emergency. — In Class I-Y shall be placed any registrant who, under the provisions of Section 1623.2 of this chapter, is not eligible for a lower class, and would be classified in Class I-A, Class I-A-O or Class I-O but for the fact that he is found under applicable physical, mental, and moral standards to be not currently qualified for service in the Armed Forces and who would be qualified for such service in time of war or national emergency declared by the Congress.

Section 1622.44(a) of the Selective Service Regulations, 32 C.F.R. Section 1622.44(a), requires the Local Board to place in Class IV-F:

> Class IV-F: Registrant Not Qualified for Any Military Service. — (a) In Class IV-F shall be placed any registrant who is found under applicable physical, mental, and moral standards to be not qualified for any service in the Armed Forces either currently or in time of war or national emergency declared by the Congress.

Army Regulation AR 601-270, Chap. B, Section II, Par. 3-9c(1) and (2) (SSLR p. 2241) delineates the "moral" standards to be used by the Selective Service System:

> c. *Criminal charges filed and pending.*
>
> (1) Men who have criminal charges filed and pending against them alleging a violation of State, Federal, or territorial statute are unacceptable. Men who have criminal charges filed and pending against them alleging a violation of a State, Federal, or territorial statute, and who as an alternative to trial for such violations, are granted a conditional release from the charge by a court on

> the condition that they will apply for induction into the Armed Forces, are unacceptable. Waivers will not be granted in these instances. See (3) below for violations of the Military Selective Service Act of 1967. If a charge was "nol prossed" or "dismissed", it is no longer "filed and pending." The statement "Suggest reevaluation of moral acceptability upon disposition of criminal charges" will be entered in the remarks section, DD Form 62 (Statement of Acceptability) for registrants found disqualified for induction on the basis of this paragraph.
>
> (2) The provisions of (1) above do not apply to registrants who have charges filed and pending against them involving minor traffic offenses. Registrants with minor traffic offenses filed and pending will be inducted, if otherwise qualified, and no waiver is required (b(4) above).

Petitioner's pending criminal trespass charge puts him squarely within the statutory category outlined above and clearly amounts to a prima facie case for disqualification. Even if it had not amounted to a prima facie showing, courts following *Mulloy* have not even insisted that a prima facie showing be made. The rationale is found in the Selective Service Regulations:

> The regulations require the board to "receive and consider all information pertinent to the classification of the registrant." [Citing 32 C.F.R. Section 1622.1 (c).] *** Failure to reopen after a registrant presents a prima facie case for a requested deferment violates registrant's right to constitutional due process. Obviously, before the board can determine whether reopening is necessary, it must at least consider the facts presented by registrant. Failure to consider the facts presented by the registrant is, therefore, no less a violation of registrant's right to procedural

> due process than is a failure to reopen after presentation of a prima facie case for a requested deferment.
>
> * * *
>
> Failure to consider such facts, in itself, constituted a denial of procedural due process whether or not those facts would have required a reopening of petitioner's classification. *Helden v. Laird*, 306 F. Supp. 1351, 1353-4 (S.D.N.Y. 1969).

Or, as the First Circuit said in *United States v. Ford*, 431 F.2d 1310, 1311-13 (1st Cir. 1970):

> If the reposing of discretion in the board is to have meaning and substance, it must be that the facts prerequisite to the exercise of judgment should come to its attention.
>
> * * *
>
> This does not mean that every request or any information rises to the level where reopening is required. But the board must at least make the assessment as to whether "non-frivolous allegations of facts" of sufficient significance were presented.

Failure to consider and evaluate information submitted to a Board by or about a registrant is a well-recognized violation of due process, regardless of the subject matter of that information: *United States v. Ford*, *supra* (medical); *United States v. Jackson*, 454 F.2d 821 (5th Cir. 1972) (medical); *United States v. Miller*, 455 F.2d 358 (9th Cir. 1972) (medical); *United States v. Trepp*, 332 F. Supp. 1331 (D. Minn. 1971) (medical); *United States v. McCarthy*, 71 Cr. 1001 (S.D.N.Y.) (medical); *United States v. Kanteles*, 4 SSLR 3351 (D. Mass. 1971) (medical); *Helden v. Laird*, *supra* (occupational); *United States v. Goodfellow*, 320 F. Supp. 812 (S.D.N.Y. 1970) (occupational); *United States v. Bittinger*, 422 F.2d 1032 (4th Cir. 1969) (ministerial status); *United States v.*

Reeves, 325 F. Supp. 179 (M.D. Fla. 1971) (ministerial status); *United States v. Mathews*, 450 F.2d 439 (1st Cir. 1971) (student status); *United States v. Polites*, 448 F.2d 1321 (3rd Cir. 1971) (hardship to dependents); *United States v. Shermeister*, 425 F.2d 1362 (7th Cir. 1970) (conscientious objection); *United States v. Moyer*, 307 F. Supp. 613 (S.D.N.Y. 1969) (conscientious objection).

As many of the above cases hold, handling by the clerical staff is clearly insufficient. "The decisive consideration is that the Board's procedure precluded it from exercising fully informed judgment." *United States v. Polites, supra*, at 1324. There can be no doubt that the Local Board in the instant case failed to meet and evaluate petitioner's letter with regard to the criminal charges pending against him: the only notation of petitioner's June 8, 1968, letter is the entry by the clerk of the Board in the Minutes, without any indication that the Board had any knowledge of, considered or voted thereon. Page 7 of the Minutes (GE 2A, 6a), reads, "6-11-68 Received ltr from reg. claiming dependency. JG", indicating clearly that the clerk had ignored the information concerning the criminal charges and had not brought the information to the attention of the Board. In any case, even if the Board had met and considered this information, it would have been required to notify petitioner of its decision not to reopen, under the then-applicable version of 32 C.F.R. Section 1625.4.

Application of the requirement that boards consider new data does not depend on an explicit request for reclassification:

> We see no logical basis for differentiating between cases where the registrant files a request based on non-frivolous grounds and those where, from other sources, information of equivalent weight is supplied. *United States v. Ford, supra*, at 1312.

See also the language in *United States v. Mathews*, *supra*, at 441, and *United States v. Moyer*, *supra*, at 615. In any case, petitioner's letter, since it presented a prima facie case for reclassification must be "liberally construed" as a request for reopening. *United States v. Hasmuk*, 419 F.2d 929 (7th Cir. 1970). Nor can the Board's failure be cured by action of other sub-agencies of the Selective Service System. The appellant's conviction was reversed in *United States v. Polites*, *supra*, despite a full review by the Appeal Board. The Local Board is established by 50 App. U.S.C. Section 460(b)(3) as the sole authority to classify persons under the Selective Service Regulations. 32 C.F.R. Section 1622.1 (c); *United States v. Miller*, *supra*, at 361.

As recognized by Judge Palmieri below, the Selective Service System, as a matter of practice, and for the convenience of the Selective Service System, has adopted the Army's criteria for rejecting applicants on "moral" grounds and in certain cases military officials reject applicants at the Armed Forces Examining and Entrance Station (AFEES). (Opinion on the pre-trial motion to dismiss, 6 SSLR 3081, at 3082, S.D.N.Y. 1973). This does not, however, relieve Local boards of their unqualified legal mandate to "consider anew the classification of a registrant" under 32 C.F.R. Section 1625.2. The law applies equally to moral and medical questions.

> While medical acceptability may be determined by AFEES, 32 C.F.R. Section 1628; *Vasilj v. United States*, 425 F.2d 1134, 1136-37 (9th Cir. 1970), classification is not. The classification process is discretionary and demands that the board take an overall view, and form a composite picture of the registrant under applicable physical, mental, and *moral*, standards. 32 C.F.R. Section 1622.17 and 1622.44; *United States v. Bagley*, 436 F.2d 55 (5th Cir. 1970). The board's failure to review new information submitted by appellant is not

> consistent with the demands thus imposed. *United States v. Miller, supra*, at 362 (emphasis added).

Similarly, the improper forwarding of a doctor's letter to the induction station without considering it was held to be prejudicial error in *United States v. Kanteles, supra;* as was failure to reopen after referring registrant to the induction station for supplementary examination (which found him qualified), *United States v. Cantero*, 471 F.2d 1190 (9th Cir. 1972). Total deference to the judgment of military officials at the induction station is an abdication of the Board's responsibility, *United States v. Sigler*, 471 F.2d 1191 (9th Cir. 1972). "Failure to consider such facts is as much a violation of due process as failure to reopen after registrant presents a prima facie case. . ." *United States v. Moyer, supra*, at 616.

> While the board is entitled to seek medical advice from the AFEES doctors, the board may not delegate to AFEES the ultimate responsibility of deciding whether or not to reopen a registrant's classification. *United States v. Ford*, 431 F.2d 1310. *United States v. Butterfield*, 5 SSLR 3094 (D. Ore. 1971).

The Classification Questionnaire prepared by every registrant when he registers with his local Selective Service Board upon becoming of age clearly states that the information supplied is intended to enable the Local Board "to classify you" (GE 2A, p.1, 4a). Series XII calls for all court records (GE 2A, p.5, 5a). Petitioner had every reason to assume that his Local Board would consider this new information concerning his pending criminal charge. Moreover, he was not notified, as provided in the form for the Government Appeal Agent's report, that the Local Board would not pass on his moral fitness for military service (GE 2G, Item 5(a) 6a). Petitioner was not given copies of these reports by the Appeal Agent bearing this admonition.

Reasons for Granting the Writ

In the instant case, the information was submitted, in accordance with a registrant's obligation to notify his Board of any change of circumstances, many months before any induction was scheduled. The information was never seen by the Local Board members, nor for that matter was it transferred to the induction station for consideration by officials there.

Furthermore, moral acceptability, unlike medical, entails no area of expertise. A registrant with a pending criminal case is simply declared unacceptable by the Selective Service Regulation and Army Regulations. There is no provision for waiver; therefore there is no discretion to be exercised.

The failure of the Local Board to consider and process the information submitted by petitioner as to the criminal charges pending against him is, therefore, clearly a denial of procedural due process which invalidates the induction order.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

Eric W. Schmidt
Faulkner & Schmidt
Attorneys for Petitioner

GOVERNMENT EXHIBIT 2E—LETTER DATED JUNE 8, 1968 FROM TARIN TO SELECTIVE SERVICE SYSTEM

Stephen A. Tarin
510½ N. Hoover St.
Los Angeles, Calif. 90004

June 8, 1968

Selective Service System
Local Board No. 7
321 W. 44th Street
New York, New York

(Stamped)
Selective Service System
LOCAL BOARD NO. 7
JUN 11 1968
321 West 44th Street
New York 36, N. Y.

Gentlemen

I hereby appeal my I-A classification.

My parents are quite ill and need to have me around. I did not know before that because of this I might qualify for a dependency deferment and I thus request another personal appearance, at which I could present the evidence in this matter to my local board. In any case, I will be sending you the medical information, letters, and other facts, in this case so that this might be sonsidered by the State Appeal Board.

Also, I understand that I should inform you of the fact that I am now being prosecuted for criminal trespass in New York County, and I hereby do so.

Thank you for arranging an interview for me with the Government Appeal Agent. However, as I have a summer job here in Los Angeles I will now be unable to appear in New York, Tuesday, June 18th. Could you therefor either arrange that I have my interview with the Government

Government Exhibit 2E

Appeal Agent here in Los Angeles or else that I have it in New York in September, as I will have to appear in New York in September in regards to the criminal charges lodged against me.

Sincerely yours

s/Stephen A. Tarin
Stephen A. Tarin
50-7-46-479

GOVERNMENT EXHIBIT 2J - LETTER FROM STEPHEN TARIN TO LOCAL BOARD

April 7, 1969
Los Angeles

Selective Service System
LOCAL BOARD NO. 7
321 West 44th Street
New York 36, New York

Sirs:

This is to inform you firstly, that being that I am living in California, it will be impossible for me to report for induction in New York on April 10th; secondly, that being that I am being retained in the custody of a criminal court (I am currently awaiting trial on charges stemming from my activity in the disturbance of Columbia last spring) I will be, in any case, unable to report for induction. I thus thereby request a cancellation of my 252 form (order to report for induction).

Moreover, despite my appeal and my request for a dependancy deferment I have never received a 118 form (dependency questionnaire). Thus my latest notice of

Government Exhibit 2J

classification (110 form dated 3/13/69) can in no way represent a rejection of my appeal by the Appeal Board. In as much as I have never had an opportunity to properly present my case and/or fill out a dependency questionnaire (form 118) I would like to know why I have received a 110 form (notice of classification dated 3/13/69) and a 252 form (order to report for induction dated 3/26/69)?

Therefore while hereby requesting a transfer of induction to Los Angeles due to my current address and a cancellation of my induction order due to a) the impossibility of my appearing due to my being retained in the custody of a N.Y. criminal court and b) of my improperly being deprived of my appeal for a 3A deferment. I furthermore request anew a personnel appearance and an appeal (on the ground of dependency. - I have had neither a personnel appearance nor an appeal to date, despite my request) and I request a new opportunity to fill out and file a 118 form (Dependency Questionnaire).

You will find, together with this letter, my completed SSS form 127 (current information question). The delay in my reply is merely due to the delay in me getting your mail (the delay presumable taken up by the process of forwarding). In trying to avoid this in the future, will you please address all further correspondence *directly* to the address given on the endorsed, completed SSS form 127 (Current Information Questionnaire): STEPHEN TARIN, C/O STUDENTS FOR A DEMOCRATIC SOCIETY (S.D.S.), P.O. BOX 85396, LOS ANGELES, CALIFORNIA, 90072.

I also have added another name to question 1 of series 1 of same 127 form so you now have the names of 3 persons knowing my address. Most of the other pertinent information concerning my case will likewise be found in

Government Exhibit 2J

the included SSS form 127 (current information questionnaire).

Sincerely yours,

s/ Stephen Tarin
STEPHEN TARIN
50-7-46-479

GOVERNMENT EXHIBIT 2A—CLASSIFICATION QUESTIONNAIRE

INSTRUCTIONS APPEARING ON FACE PAGE OF SELECTIVE SERVICE CLASSIFICATION QUESTIONNAIRE (SSS FORM NO. 100)

* * *

INSTRUCTIONS

The law requires you to fill out and return this questionnaire on or before the date shown to the right above in order that your local board will have information to enable it to classify you. A notice of your classification will be mailed to you. When the questions in any series do not apply, enter "NONE" or "DOES NOT APPLY."

The law also requires you to notify your local board in writing, within ten days after it occurs, of (1) every change in your address, physical condition and occupational, marital, family, dependency and military status, and (2) any other fact which might change your classification.

Fill out with typewriter or print in ink, except signatures.

_____
Member or Clerk of local board

GOVERNMENT EXHIBIT 2A—CLASSIFICATION QUESTIONNAIRE

SERIES XII OF SELECTIVE SERVICE QUESTIONNAIRE (SSS FORM NO. 100)

* * *

Series XII.—COURT RECORD
(Use Page 6, if necessary)

1. I (check one): ☐ HAVE ☐ HAVE NOT been convicted of adjudicated of a criminal offense or offenses, other than minor traffic violations. (If "HAVE" box is checked, complete this series.)

Offense (other than minor traffic violations)	Date of conviction (Month, Day, Year)	Court (Name and Location)	Sentence

2. I (check one): ☐ AM ☐ AM NOT now being retained in the custody of a court of criminal jurisdiction, or other civil authority. Specify_____

(Awaiting trial, on probation, or parole, etc.)

* * *

EXTRACT OF GOVERNMENT EXHIBIT 2-G GOVERNMENT APPEAL AGENT REPORT

* * *

5. What classification or classifications does registrant claim to be eligible for.

(a) If the registrant is claiming a I-Y or IV-F classification, it should be explained that neither the Local Board or State Appeal Board is privileged to review or pass on the determination of the Armed Forces as to his physical, mental or moral fitness for military service; however, the Appeal Board will review the entire file to assure that the classification properly reflects the information contained in the file. In this regard, advise registrant to submit all pertinent medical statements or x-rays that would have a bearing on his claim so that the Armed Forces Examiners will have the benefit of same.

* * *

EXTRACT FROM GOVERNMENT EXHIBIT 2A– CLASSIFICATION QUESTIONNAIRE (MINUTES OF ACTION BY LOCAL BOARD)

(Registrant Will Make No Entries on This Page)

Dates	Minutes of Actions by Local Board and Appeal Board and on Appeal to the President (Continued from Page 8)	Vote Yes	Vote No
4-8-68	SSS No. 127 filed—no longer student. m.		
4/11/68	Pending receipt of additional Med. Info. Z.	3	2

Extract from Government Exhibit 2A

4-11-68	Ltr. from reg. filed with medical evidence. m.			
5/14/68	Information Reviewed, no change. Z.	4	0	
5-15-68	SSS FORM NO. 110 AND SSS FORM NO. 217 MAILED.			
6-5-68	Notice of appoint. for appeal agent mld to reg. JG.			
6-11-68	Recd ltr from reg. claiming dependency JG.			
6-11-68	Form 118 mld to reg. JG.			
6-18-68	Appeal agent reviewed file.			e
8-5-68	Ltr mld to reg to return F118—gave interview 9/68			e
11-7-68	Ltr mld to reg to appear 11-19-68—appeal agent interview			
11-19-68	Appeal agent rev. file.			
11-21-68	Form 33 mld to parents.			e
12-2-68	Reply from parents—same address.			
1/21/69	Appeal Agent rev file.			e
1/22/69	File to Appeal Bd, Panel No. 1.			e
3/13/69	File returned from NYC Hdqts Appeal Bd reg classified 1A 3/12/69	5	0	

Extract from Government Exhibit 2A

3/13/69	SSS Form 110 mld to registrant.			c
3-13-69	SSS FORM NO. 127 MAILED.			
3-26-69	INDUCTION NOTICE MAILED FOR 4-10-69.			
4/11/69	SSS Form 127 and ltr from registrant, filed.			
4/15/69	Info. Rev. - Facts Do Not Warrant Change.	4	0	
4/17/69	NYC Form 59 mld.			
4-17-69	Papers from afees - reg fld to report for ind 4-10-69			
4/17/69	Ltr from registrant lawyer-requesting physical exam.			
5/12/69	Reg. file reviewed by S. Sandler.			

GOVERNMENT EXHIBIT 2K - LETTER DATED APRIL 17, 1969 FROM SELECTIVE SERVICE TO STEPHEN A. TARIN

New York City
Selective Service System

Selective Service System
LOCAL BOARD NO. 7
321 W. 44th Street
New York, N.Y. 10036

Date: April 17, 1969

(Local Board Stamp)

Mr. Stephen A. Tarin
P.O. Box 85396
Los Angeles, California 90072

Government Exhibit 2K

SS NO. 50-7-46-479

Dear Sir:

This will advise you that the recent evidence submitted, concerning your case has been reviewed by this Local Board. It is the decision of this Board that such evidence does not justify the reopening of your case and reconsideration of your present classification.

You will, therefore, be subject to continued processing.

You are to report to the nearest local board in your area and request a transfer of induction.

By Direction of the Local Board

s/ C. Mason
Clerk

SSS-N.Y. City
Form No. 59
(Revised: Nov. 1964)

OPINION OF PALMIERI, D.J.
DELIVERED FROM BENCH

THE COURT (Palmieri, J.): The indictment charges that: The defendant, Stephen Allen Tarin, on or about the 10th day of April 1969, up to and including the date of the filing of this indictment, in the Southern District of New York, unlawfully and knowingly did fail, neglect and refuse to perform a duty required of him under and in execution of the Military Selective Service Act of 1967, Title 50 Appendix, United States Code, Section 451 et seq., and the rules, regulations and directions made

pursuant thereto, in that he, being a registrant, to whom an order to report for induction had been mailed by his Selective Service System local board, unlawfully and knowingly did fail, neglect and refuse to report for induction into the Armed Services of the United States.

The trial was conducted without a jury and only two witnesses were heard, the clerk or representative of the local draft board, Edward R. Martin, and the defendant himself, in his own behalf. The files of the local draft board are before the Court and have been marked in evidence on the basis of Mr. Martin's testimony.

Section 462(a) of the Military Selective Service Act of 1967 provides that:

"Any person who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in execution of this Act or rules, regulations and directions made pursuant to this Act," is guilty of a crime.

The indictment charges a violation of a regulation contained in Title 32, Code of Federal Regulations, which reads in pertinent part as follows:

"Section 1632.14. Duty of registrant to report for and submit to induction.

"(a) When the local board mails to a registrant an order to report for induction, it shall be the duty of the registrant to report for induction at the time and place fixed in such order. Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuing duty from day to day to report for induction to his local board;

"(b) Upon reporting for induction, it shall be the duty of the registrant . . . (3) to appear at the place where his

induction will be accomplished, (4) to obey the orders of the representatives of the Armed Forces (while at the place where his induction will be accomplished), (5) to submit to induction."

I find beyond a reasonable doubt that the defendant, Stephen Allen Tarin, was a registrant of Local Board 7 under the Military Selective Service Act of 1967; that Local Board 7 mailed an order to the defendant to report for induction; and that from April 10, 1969, up to and including the date of the filing of the indictment, that is, April 27, 1972, the defendant unlawfully and knowingly failed, neglected and refused to report for induction as ordered.

I have given a great deal of thought to the defendant's testimony, but I could not accept any of it. I think his testimony is unpersuasive and incredible. This defendant is an unusually intelligent young man with years of college studies to his credit. He is articulate and alert and there is no doubt in my mind that he was aware of his duties and that he manipulated the procedures of the draft board for the purpose of avoiding them and creating a defense for himself in this very action.

His conduct with respect to the non-receipt of mail is utterly incredible, and I reject it out of hand. He says that he used an SDS store front maintained by members of the organization known as Students for Democratic Society in Los Angeles and that that is where he received his mail; that he received all of his mail, so far as he is aware, except that four pieces of mail from the local draft board were not received by him.

He chose to use this store front where a number of persons had access to the incoming mail. He also chose to use a post office box where a number of persons from this SDS organization also obtained their mail. And yet it never occurred to him to take out a post office box in his own

name, nor did it apparently occur to him that he could have used the address of any one of the number of aunts and uncles that he says he had in Los Angeles.

I do not accept his testimony that he did not receive the mail. There is a presumption that mail which is properly addressed and sent through post office channels is received in accordance with the instructions on the envelope. These letters were mailed in the regular course of business and none of them was returned by the post office to the local board.

That coupled with the defendant's unacceptable testimony, I can arrive at only one conclusion and that is that all of this mail did arrive at the place to which it was addressed and that the defendant deliberately chose to disregard it.

His capacity for manipulation is manifested by another episode, that is the episode with respect to his order of induction and his letter dated April 7th, but mailed on April 9th; his attempt to be inducted in Oakland, California, a sham procedure because he knew at that time that he was under indictment and would not be accepted.

All of his actions indicate that he went as far as he could to make good a facade of confusion and frustration for his own benefit, always intending that by his complex maneuvers he would in some way baffle the official procedures and come out of it unscathed.

His conduct, in my opinion, deserves a censure for his capacity to resist induction by everything short of an outright refusal. He resisted induction by a charade and by deceit and continued by dishonest testimony on the stand.

Opinion of Palmieri, D.J. Delivered from Bench

I find that he was aware of his duties and that he deliberately refused to comply with them.

The government's case has been proved beyond any reasonable doubt, beyond, indeed, any possible doubt. The defendant registered for Selective Service on December 24, 1964. Until January 23, 1968, he was classified 1A, available for military service; that he was notified of his right to a personal appearance and appeal on January 29, 1968, and made a timely request for a personal appearance.

On March 16, 1968, after having undergone an Armed Forces physical examination, the defendant was found fully qualified for military service and he was notified of this fact on March 26, 1968.

At the personal appearance which was held on April 11, 1968, the defendant exclaimed that he had discontinued college temporarily due to illness.

On May 14, 1968, the local board, after examining the defendant's file, declined to change his classification.

On May 15, 1968, the defendant was notified of the board's actions.

On June 11, 1968, the local board received a letter in which the defendant requested an appeal. He gave a change of address to 510-1/2 Hoover Street, Los Angeles, California, 90004. This was the store front of the SDS organization where he claims he did not receive any mail, the testimony that I reject. I find that he did receive mail addressed to him at that address.

After several unsuccessful attempts to obtain substantiation of the claim made by the defendant, his file was forwarded to the appeal board and that board unanimously classified him 1A on March 12, 1969.

Opinion of Palmieri, D.J. Delivered from Bench

The board was entirely correct in its conclusion and was completely justified in unanimously classifying him 1A. The defendant was notified of this classification on March 13, 1969.

On March 26, 1969, the local board mailed the defendant an order to report for induction on April 10, 1969, when the defendant deliberately failed to report. The April 7th but mailed April 9th letter to which I have already referred was received by the local board on April 11th, the day after induction, and I think this was intended by the defendant. And this was a letter in which he acknowledged receipt of the induction order.

The fact that the defendant sought to raise his arrest for criminal tresspass as a result of the university sit-in at Columbia, proceedings which appear to have been dismissed, proceedings which brought him to New York, do not in any way impinge upon the validity of any of the facts that have been found or the conclusions which have been drawn from those facts. I wish to say in passing that, here again, the episode of his presence in New York and his avoidance, his intentional avoidance, of contact with the local board at that time, manifests a long continued and successfully carried out plan to avoid his obligations to the local board, to cut communications with them and thereby frustrate their ability to bring his classification and induction to fruition.

I think the conclusion is inescapable that the defendant should be found guilty, and I find him guilty as charged.

No. 73-704

In the Supreme Court of the United States

OCTOBER TERM, 1973

STEPHEN ALLEN TARIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The issue presented is whether the failure of petitioner's local Selective Service Board to reopen his classification when notified that he was awaiting trial on criminal charges invalidated his subsequent induction order.

Following a jury-waived trial before the United States District Court for the Southern District of New York, petitioner was convicted of willfully failing to report for induction into the armed services, in violation of 50 U.S.C. App. 462(a). He was sentenced to one year's imprisonment and a fine of $2,500 (Pet. App. 9a-14a). The court of appeals affirmed without opinion (Pet. App. 15a).

Petitioner registered with Selective Service on December 24, 1964 (SSF 3).[1] He was classified I-S(H) since he

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[1] "SSF" refers to petitioner's Selective Service File, which we are lodging with the Clerk.

had not yet completed high school. He was subsequently deferred as a college student (II-S). He was reclassified I-A on January 23, 1968 (SSF 11) after he failed to provide current information documenting his student status, which had been requested by the local board (SSF 26). At a personal appearance on April 11, 1968, he told the board that he had discontinued classes because of illness. He presented a doctor's certificate to that effect and promised further information (SSF 54-58). His file was reviewed and reopened on May 14, 1968; since no new information had been submitted, the I-A classification was renewed (SSF 10). A notice of appointment with a government appeal agent for June 18 was mailed to petitioner on June 5, 1968 (SSF 60).

On June 8, 1968, petitioner mailed the following letter to his board (SSF 61):

> My parents are quite ill and need to have me around. I did not know before that because of this I might qualify for a dependency deferment and I thus request another personal appearance, at which I could present the evidence in this matter to my local board. In any case, I will be sending you the medical information, letters, and other facts, in this case so that this might be sonsidered (*sic*) by the State Appeal Board.
>
> Also, I understand that I should inform you of the fact that I am now being prosecuted for criminal trespass in New York County, and I hereby do so.
>
> Thank you for arranging an interview for me with the Government Appeal Agent. However, as I have a summer job here in Los Angeles I will now be unable to appear in New York, Tuesday, June 18th. Could

> you therefore either arrange that I have my interview with the Government Appeal Agent here in Los Angeles or else that I have it in New York in September, as I will have to appear in New York in September in regards to the criminal charges lodged against me.

The letter bore a Los Angeles mailing address. Upon receipt of this letter, the local board mailed a dependency questionnaire to petitioner, directing that it be returned promptly (SSF 66). On June 18, the appeal agent recommended that the file be held open until September, as petitioner requested (SSF 65). On November 1, 1968, petitioner's interview was rescheduled for November 19 (SSF 67). He did not appear at that time or otherwise communicate with the board, and he did not reply to two further communications directed to him (including a request to return the dependency questionnaire). None of the letters sent by the board was returned, and his mother informed the board that petitioner could be reached at the Los Angeles mailing address that the board was using (SSF 71).

Following a final review by the appeal agent on January 21, 1969 (SSF 73-74), the case was forwarded on appeal; petitioner was reclassified I-A by the Appeal Board on March 12, 1969 (SSF 10, 27). A current information questionnaire was mailed to him on March 13 at the Los Angeles address but was not returned until April 11 (SSF 80).

On March 26, 1969, an order to report for induction was mailed to petitioner's Los Angeles address directing him to report on April 10, 1969 (SSF 75). In a letter postmarked April 9, petitioner wrote the local board again stating that he was awaiting trial on criminal charges, and claiming that he had not received

the dependency questionnaire. He requested a personal appearance, an appeal, and another chance to fill out the dependency questionnaire (SSF 76-77; Pet. App. 2a-4a). The board reviewed his file once more on April 15, 1969, and declined to reopen (SSF 10). The board so informed him, and instructed him to request a transfer of induction to his area of residence (SSF 84). The petitioner took no action and did not further communicate with the board. This prosecution followed.

1. Petitioner contends that the board erred in failing to consider him for a I-Y or IV-F deferment when, in his letter of June 8, 1968, he first advised that he was being prosecuted on charges of criminal trespass. While it might have been more efficient for the board to request further details and documentation of the criminal charges at the time petitioner was mailed the dependency questionnaire on June 11, 1968, the board's failure to do so denied petitioner no rights to which he was entitled by statute or regulation.

In the letter of June 8, petitioner claimed a III-A (dependency) classification because his parents, both ill, needed his presence at home, but he supplied no supporting facts. He also mentioned briefly his prosecution in New York, which might support a I-Y classification (see Army Regulation 601-270, Chap. 3, Sec. II, Para. 3-9c (1) and (2) (April 19, 1971)). Nothing in the letter suggests a request to be so classified, as required by 32 C.F.R. 1625.2;[2] *United States* v. *Brunner*, 457 F. 2d 1301, 1302 (C.A. 9); *United States* v. *Currier*, 453 F.2d 1242, 1243 (C.A. 9). Since the letter is perfectly clear in requesting only the dependency deferment, petitioner's argument

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[2]All references to the Selective Service Regulations are to those in effect in 1968 and 1969.

(Pet. 9) that the statement concerning his prosecution should be "liberally construed" as a second request for reopening on different grounds is devoid of merit. *United States* v. *Brunner, supra; United States* v. *Pompey*, 445 F.2d 1313, 1320-1321 (C.A. 3).

Moreover, the letter stated no *prima facie* case for either deferment, as there was no request "accompanied by written information presenting facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification." 32 C.F.R. 1625.2. No reopening of his classification was therefore required. *Mulloy* v. *United States*, 398 U.S. 410. Petitioner stated that his parents were ill and needed his presence, yet did not state that he was contributing to their support, or even that he was then living with them.[3] At trial, he could not even remember their address during this time (Tr. 113-115, 119, 172). He provided in addition only the totally unsupported allegation that he was being prosecuted for criminal trespass in New York County. The charges were not sufficiently identified as to court or violation to enable any decision to be made by the board. In any event, the mere retention in custody of any registrant does not extinguish his lawful obligations under Selective Service law, 32 C.F.R. 1642.32, and he would be obliged to perform all lawful obligations upon release. 32 C.F.R. 1642.33, and see *United States* v. *Brunner, supra*.[4]

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[3]Since his previous mailing address had been that of his parents in New York (SSF 4, 5), and his letter indicated he had a summer job in Los Angeles and gave a Los Angeles mailing address, the implication was that he was not living with them.

[4]Petitioner testified that the criminal trespass charge against him was dismissed shortly after he got his induction notice (Tr. 88-89).

Although no reopening was appropriate on receipt of petitioner's June 8 letter, the board did attempt to obtain additional information which might require a reopening. It thus attempted to meet its obligation to "keep informed of the status of classified registrants." 32 C.F.R. 1625.1. Petitioner was, accordingly, mailed a dependency questionnaire (SSS Form 118) on the day his letter was received. It was not inappropriate for the board to investigate the possibility of this deferment first, since it was the only deferment he had requested and since any registrant must be "classified in the lowest class for which he is determined to be eligible." 32 C.F.R. 1623.2

Even if the board had taken no action at all in June 1968, petitioner would not have been prejudiced, since petitioner had an appeal pending, and the regulations proscribe issuance of an order to report for induction while an appeal is pending. 32 C.F.R. 1626.41. After petitioner was classified I-A by the Appeal Board, he was sent a current information questionnaire and directed to return it promptly (SSF 80). Had he done so, and presented in a timely manner information indicating that a reopening was appropriate, the board would doubtless have considered his claims. As it was, the questionnaire was not returned until after the induction notice issued. The board therefore properly refused to reopen.

When the file was ultimately forwarded to the Appeal Board in January 1969, eleven months had elapsed since petitioner's prior classification and request for appeal. He had not responded to four mailings from the board, which the court found to have been received, and which would have afforded a basis for final action on his appeal or a reconsideration of his classification. He had not reported for his rescheduled interview with the appeal

agent or otherwise communicated with the board, in spite of a letter from his parents in November which had verified his Los Angeles mailing address. For the board to have delayed his processing further would have allowed him to prevent his own induction by willful noncooperation and would have prejudiced the rights of other registrants inducted in his stead. The lack of new information following return of the file from the Appeal Board precluded any possibility of perfecting either a I-Y, IV-F or III-A classification.

2. Petitioner's claim that he was denied due process because the local board members did not see and consider his letter of June 8, 1968, which allegedly presented a *prima facie* claim for a lower classification, is unsupported in the record. The record, contrary to petitioner's claim, does not show whether the letter was brought to the personal attention of the board or handled only at the staff level, although the logical course of procedure would be for the executive secretary to file the letter and mail the dependency questionnaire, and then bring both documents to the personal attention of the board when the questionnaire was returned with sufficient information to permit the board to act.

If the letter here was not brought to the personal attention of the board, it would not invalidate the induction order, since the action taken--the attempt to obtain more information--was unquestionably proper. We recognize that several district court decisions have ruled that 32 C.F.R. 1622.1(c) requires board, and not merely staff, consideration of all information received from a registrant relating to his classification, regardless of whether a *prima facie* claim is presented, see *United States* v. *Moyer*, 307 F. Supp. 613, 615 (S.D. N.Y.); *United States* v. *Walsh*, 279 F. Supp. 115, 120-121 (D. Mass.),

but no court of appeals has so ruled, except in the context of a *prima facie* case where reopening would be required under *Mulloy* v. *United States, supra.*[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

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[5] *United States* v. *Ford*, 431 F.2d 1310 (C.A. 1), relied on by petitioner, involved letters which represented, in the court's view, "vital new information" (*id.* at 1312). See also *United States* v. *Jackson*, 454 F.2d 821 (C.A. 5), and *United States* v. *Stockwell*, 485 F.2d 700 (C.A. 1). The question of when board, as distinct from staff, action is required is more fully considered in our memorandum in opposition in *Thrower* v. *United States*, No. 73-5621, certiorari denied February 19, 1974, petition for rehearing pending. We are sending a copy of that memorandum to petitioner.